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IN THE

Supreme Court of the United States

No. 82-827

October Term, 1982

STATE OF MINNESOTA,

Petitioner,

vs.

MARSHALL DONALD MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In his Brief in Opposition respondent makes two plausible arguments for denial of certiorari in this case. Both arguments, however, rest on patent misrepresentations of the record before this Court.

First, respondent contends that whether or not the self-incrimination clause of the Fifth Amendment is self-executing, he timely claimed his privilege against self-incrimination by expressing his desire to talk to an attorney (Brief in Opposition at 5-7).

The question whether respondent made a timely claim of his Fifth Amendment privilege was decided by the trial court in the negative. The trial court found as a matter of

fact that respondent's reference to an attorney was made in the context of a civil suit for breach of confidentiality against the counselor who disclosed confidential information to his probation officer and did not, therefore, constitute an assertion of respondent's privilege against self-incrimination (App. B-13-14).

The Minnesota Supreme Court assumed without deciding that the trial court's finding was correct. It accurately summarized the facts as follows: "The [probation officer] apparently opened the meeting by telling [respondent] about the information which she had received from the counselor and then said that she now felt that [respondent] needed treatment. [Respondent] became angry when he learned this. He stated that he felt his confidences had been breached by the disclosure and that he felt like calling an attorney." (App. A-3.) The Minnesota Supreme Court indicated that it did not need to "decide whether [respondent] in fact claimed [his] privilege [against self-incrimination] in this case because . . . an exception must be made on the facts of this case to the general rule requiring a timely claim of the privilege." (App. A-9.) Thus, the Minnesota Supreme Court left undisturbed the trial court's finding that respondent did not assert his Fifth Amendment privilege against self-incrimination by expressing his desire to talk to an attorney in the manner in which he did.

Accordingly, the question before this Court is whether, as the Minnesota Supreme Court held, respondent's Fifth Amendment privilege was self-executing under the circumstances of this case. Petitioner reaffirms that this question is important, has been wrongly decided by the Minnesota Supreme Court, and is clearly presented by the record herein.

Second, respondent asserts that the cases cited by petitioner in support of the proposition that there is an apparent conflict between the decision of the Minnesota Supreme Court and the decisions of other state and federal appellate courts are distinguishable because, in the present case, respondent's probation officer deceived him regarding her intentions and motives in holding the September 28 interview (Brief in Opposition at 3-4). Even a cursory review of the record before the Court discloses that this assertion is a misrepresentation of the record. Neither the Minnesota Supreme Court nor the trial court ever so much as suggested that respondent's probation officer acted deceptively, with ulterior motives, or in concert with the police. Respondent's assertion that the Minnesota Supreme Court "found" that "the probation officer intentionally used the compulsory processes of the court for the purpose of gathering evidence for the police" (Brief in Opposition at 2), has no basis in fact because the Minnesota Supreme Court made no such "finding" in its opinion.[1]

Because the arguments respondent makes in his Brief in Opposition do not apply to the record before the Court and for the reasons set forth in the Petition, this Court should issue a writ of certiorari to give the important ques-

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[1]Citing *Estelle v. Smith*, 451 U.S. 648 (1976) respondent also contends that the Minnesota Supreme Court applied "settled constitutional principles" to reach the result herein (Brief in Opposition at 3). As the Court was at pains to point out in *Estelle*, however, the facts of that case fell squarely within the Court's holding in *Miranda v. Arizona*, 384 U.S. 486 (1966). As demonstrated in the Petition, the facts of the present case not only fall outside of *Miranda's* holding but they dictate a contrary result under the Court's subsequent interpretation of *Miranda*. *See, e.g., Oregon v. Mathiason*, 429 U.S. 492 (1977).

tion of federal constitutional law presented herein the plenary consideration it deserves.

Respectfully submitted,

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